IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 405 of 2001

For Approval and Signature:

HONOURABLE MR.JUSTICE A.M.KAPADIA

HONOURABLE MR.JUSTICE K.A.PUJ

==========

1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

==========

SHIVPRASAD (SHRIPRASAD) RAMPRASAD KUMBHAR & 1 - Appellant(s)

Versus

STATE OF GUJARAT & 1 - Respondent(s)

==========

Appearance :

MS. SHILPA R SHAH appointed by Legal Aid Committee for Appellants

MR KT DAVE ADDL.P.P. for respondents

==========

CORAM : HONOURABLE MR.JUSTICE A.M.KAPADIA

and

HONOURABLE MR.JUSTICE K.A.PUJ

Date : 24/01/2007

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE A.M.KAPADIA)

1. The appellants ('the accused' for short) were tried by the learned Additional Sessions Judge, Court No.13, City Sessions Court, Ahmedabad, in Sessions Case No.213 of 2000 for commission of the offences punishable under Section 8 (c) read with Sections 21 and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 ('the NDPS Act' for short) arraigned on charge of accused No.1 having been found with contraband article charas weighing one Kg. (two packets containing 500 grams each) whereas accused No.2 having been found with contraband article charas weighing 500 grams (one packet), without pass/permit when they were intercepted and

apprehended near Three Junction Road, Old Air-Port Road, Near Meldi Mata's temple, Sardarnagar, Ahmedabad, on the basis of the prior information received by P.W.3, Bimalbhai Motilal Rajvanshi. At the end of the trial, the accused were found guilty for possessing the contraband article charas without pass/permit and as their complicity is proved, the trial court convicted them vide judgment and order dated 30.3.2001 for commission of the offence punishable under Section 8 (c) read with Section 20 (b) of the NDPS Act and sentenced each of them to suffer R.I. for ten years and fine of Rs.1 lakh i.d., R.I. for further one year.

2. Aggrieved by the aforesaid judgment and order of conviction and sentence, the accused have filed this appeal under Section 374 of the Code of Criminal Procedure ('the Code' for short).

3. Briefly stated, the prosecution case, as

disclosed from the FIR and unfolded during the trial, are as under:

3.1. P.W.3, B.M. Rajvanshi, P.I. State Narcotic Cell, CID Crime, received a secret information on 22.2.2002 from U.M. Jadhav, PSI through an informant regarding possession of contraband article charas by the accused which was noted down in the information register (Batmi Register). Thereafter permission was sought from the Superintendent, State Narcotic Cell for conducting raid. Vinod Dantania, a Police Constable was directed to bring two persons to act as panch witnesses for the purpose of carrying out the raid. The panchas were informed about the secret information received. On 23.2.2000, P.W.3, BM Rajvanshi, along with the members of the raiding party and panchas went in Government vehicles No.GJ-1-G-1331, GJ-1-BF-7860 and GJ-1-BB-65 and reached at the Kotarpur approach road near Thakhaji Thakore's tea Lari. Members of the raiding party took their position

in the said area where the informant accompanied them to identify the persons who were to approach with 1.5 Kg. charas. At about 4.45 P.M. both the accused came there and they were caught with 1.5 Kg. of charas. On carrying out search and seizure, a detailed procedure followed regarding recording of the panchnama, preparation of seizure memo, preparation of the arrest memo, etc.

3.2. On completion of the raid, a complaint was lodged by P.W.3, B.M. Rajvanshi in State Narcotic Cell, CID Crime Branch which is on record at Ex.40 and on the basis of the complaint crime was registered against the accused for commission of the offences punishable under sections 8 (c), 21 and 29 of the NDPS Act.

3.3. Pursuant to the registration of the complaint, P.W.4, Vakhatsingh Jethisingh Solanki, PSI, was entrusted with the investigation. During the course of investigation, he recorded

statements of witnesses and arranged to send the muddamal to FSL Ahmedabad for analysis through P.W.1, Bldevji Chhanji Meena, ASI, Narcotic Cell. On receipt of the FSL report certifying that the muddamal which was sent for analysis was charas and as incriminating evidence was found against the accused, P.W.4, BM Rajvanshi filed charge-sheet against the accused for commission of the aforesaid offences in the Metropolitan Magistrate's Court, Ahmedabad.

3.4. As the offences under the NDPS Act are exclusively triable by the Court of Sessions, the learned Metropolitan Magistrate committed the case to the City Sessions Court, Ahmedabad.

3.5. The learned Additional Sessions Judge, Court No.13, City Sessions Court, Ahmedabad to whom the case was made over for trial, framed charge against the accused for commission of the offences punishable under sections 8 (c), 21 and 29 of the NDPS Act which was read over and

explained to the accused. As the accused pleaded not guilty to the charge and claimed to be tried, they were put to trial in Sessions Case No.213 of 2000.

3.6. To prove the culpability of the accused, the prosecution has examined four witnesses and relied upon their oral testimony, details of which are given in para 2 of the impugned judgment and order. They are as under:

P.W. No.	Name	Ex.No.	Page No.
1	Baldevji Chhanaji Meena	14	63-70
2	Mahendrakumar Bhikhabhai Patel	20	71-87
3	Bimalbhai Motilal Rajvanshi	28	83-124
4	Vakhatsingh Jethisingh Solanki	45	125-148

3.7. To bring home the charge levelled against the accused, the prosecution has also produced number of documents and relied upon the contents

of the same. They are also mentioned in para 2 of the impugned judgment and order. They are as under:

Sr. No	Particulars	Ex. No	Page No
1	Information communicated to the superior dated 23.2.2000	33	421-424
2	Panchnama of the search of the accused dated 23.2.2000	21	391-402
3	Letter addressed to th accused Shivprasad explaining the provisions of the search dated 23.2.2000	34	425-426
4	Letter addressed to the accused Mohanlal explaining the provisions of the search dated 23.2.2000	35	427-428
5	Seizure memo given to accused No.1 dated 23.2.2000	36	429-430
6	Seizure memo given to accused No.2 dated 23.2.2000	37	431-432
7	Information of arrest given to accused No.1 dated 23.2.2000.	38	433-434
8	Information of arrest given to accused No.2 dated 23.2.2000.	39	435-436
9	Original complaint of Rajvanshi	40	437-440
10	Communication to the superior regarding th raid dated 23.2.2000	41	445-448
11	Copy of letter sent to FSL dated 24.2.2000	42	449-452
12	Receipt of FSL dated 24.2.2000	15	381-382
13	Copy of letter sent to FSL dated 24.2.2000	43	453-456

Sr. No	Particulars	Ex. No	Page No
14	Receipt of FSL dated 24.2.2000	16	383-384
15	Opinion of FSL with covering letter dated 28.2.2000	46	457-468
16	Opinion of FSL with covering lester dated 28.2.2000	47	469-478
17	Panch slips	22 to 27	403 to 408
18	Muddamal Pavit	31	413-416
19	Copy of station diary	32	417-420
20	Copy of extract of muddamal register	18	387-388
21	Opinion penned down in Batmi register	29 & 30	409-410 & 411-412
22	Closing purshis	50	487-488

3.8. After recording of the evidence of the prosecution witnesses was over, the trial court explained to the accused the circumstances appearing against them in the evidence of the prosecution witnesses and recorded their further statement as required under section 313 of the Code. In their further statement, the accused denied the case of the prosecution. They have

stated that they are in relation is uncle and nephew, one of whom has an egg lari and the other has kulfi lari and they both reside in the same house at Subhash Nagar. The police had gone to their house and asked them to sit in an auto rickshaw. They never traded in narcotic drugs or psychotropic substance. They also denied of having been asked their willingness to be sarched in presence of a Class I Officer or an Executive Magistrate. According to them, on the previous day, police had gone to their lari to eat eggs, when they demanded the money they were slapped and asked them to meet the police the next day and on the next day they both were caught from their residence as the police was vindicative after having demanded the money. However, they have neither produced any evidence nor did they examine any witness in support of their defence.

3.9. On appreciation, evaluation, analysis and scrutiny of the evidence on record, the trial court has held that the prosecution has

established beyond reasonable doubt that on 23.2.2000, A-1 and A-2 both were found with contraband article charas weighing in all 1500 grams. Therefore complicity of the accused is established by the prosecution beyond reasonable doubt and, therefore, the trial court held that the accused persons are guilty of the offence punishable under section 8 (c) read with section 20 (b) of the NDPS Act and sentenced each of them to suffer RI for ten years and fine of Rs.1 lakh and in default of payment of fine, RI for further one year, which has given rise to instant appeal at the instance of the accused.

4. Ms. Shilpa Shah, learned advocate appointed by the Legal Aid Committee to assist the accused, has contended that the prosecution has examined the members of the raiding party who have not followed the mandatory and statutory provisions contained under the NDPS Act and, therefore, on account of non-compliance of the mandatory as well as statutory provisions of NDPS

Act, the prosecution evidence cannot be relied upon and cannot be acted upon. It is also contended by her that the trial court has misdirected itself in relying upon the oral testimony of the prosecution witnesses in respect of the alleged receipt of secret information, search of the person of the accused persons, seizure of muddamal, arrest of the accused at the scene of offence, etc. It is also pointed out by her that the prosecution has failed to establish that the contraband article which was sent to FSL was not tampered with during the course of its journey from filing of the complaint to the stage of its reaching the FSL. According to her, there is non-compliance of the provisions of Sections 52 and 55 of the NDPS Act. On the aforesaid premises it is contended by her that the prosecution has failed to establish the case beyond reasonable doubt and, therefore, the impugned judgment and order deserves to be quashed and set aside and thereby both the accused may be acquitted of the offences with

which they are charged. She, therefore, urged to allow the appeal.

5. In counter submission, Mr. KT Dave, learned APP for respondent – State of Gujarat, has submitted that by voluminous evidence produced by the prosecution, the complicity of the accused is proved beyond reasonable doubt. The accused were found and caught red-handed with contraband article charas. It is also submitted by him that after following and observing mandatory and statutory provisions contained under the NDPS Act, the contraband article was seized and sealed in presence of the members of the raiding party as well as panchas. FSL report in terms certified that the said contraband article which was sent for analysis was charas. It is also highlighted by him that the prosecution has successfully established that the sample was not tampered with during the course of the journey from the stage of filing of the complaint till it reached the FSL. On the

aforesaid premises, according to him, the prosecution has established the case beyond reasonable doubt and, therefore, the trial court has rightly recorded the order of conviction and sentence and the impugned judgment and order does not warrant any interference of this court in this appeal and as the appeal lacks merits, deserves to be dismissed. He, therefore, urged to dismiss the appeal.

6. This Court has considered the submissions advanced by the learned advocates appearing for the parties and perused the impugned judgment and order. This Court has undertaken a compete and comprehensive appreciation of all vital features of the case and the entire evidence on record which is read an re-read by the learned advocates for the parties with reference to broad and reasonable probabilities of the case. In light of the caution sounded by the Supreme court while dealing with NDPS cases, this court has examined the entire evidence on record for itself

independently of the trial court and considered the arguments advanced on behalf of the accused and infirmities pressed, scrupulously with a view to find out as to whether the trial court has rightly recorded the order of conviction and sentence.

7. At the outset, be it noted that to combat illicit drug traffic and drug abuse, both at the national and international levels, the penal provisions contained under the NDPS Act are stringent and punishment thereunder is harsh, therefore, as per the settled principles of criminal jurisprudence, the Court of law must insist on the strict compliance of the safeguards provided under the statutory provisions contained thereunder.

8. In this connection, it would be appropriate to refer to the observations made by the Supreme Court in the case of Bharatbhai Bhagwanjibhai v. State of Gujarat, AIR 2003 SC 7. In para 1 of the said judgment, the Supreme Court has observed as

under:

> “The Statement of Objects and Reasons of the NDPS Act categorically records the inadequacy of the existing legislation to combat illicit drug traffic and drug abuse, both at the national and international levels and it is by reason of such deficiencies in the existing laws, the legislature thought it prudent to consolidate the same and bring about a comprehensive legislation so as to meet the exigencies of the situation. A plain look at the provisions of the NDPS Act read with the Statement of Objects and the Preamble would depict the intent of legislature as regards the offences under the said consolidated legislation, which stands expressed in rather explicit language as one of the most heinous ones in nature. This Court, however, in consonance with criminal jurisprudence of the country has been insisting on strict compliance of the safeguards provided

under the statute so as to be in tune therewith".

9. In view of the stringent penal provisions and harsh punishment provided thereunder and in view of the observations made by the Supreme Court in the above referred to judgment, we have to find out as to whether in instant case strict compliance of the safeguards provided under the statute have been observed by the Police Inspector during the course of search of the accused and seizure of the muddamal, contraband article, charas.

10. In this connection, we shall refer to the testimony of P.W.3, BM Rajvanshi, Ex.28, pages 83-124 of the paper book. He has, inter alia, testified that he was communicated a secret information by PSI Jadhav on 22.2.2000 to the effect that two Bhaiyaji of UP namely, Shivprasad and Mohanlal, were going to come to the Old Airport Three Roads near Meldi Mata Temple at

around 3 P.M. for selling charas of 1 ½ Kg. to 2 Kg. The informant did not want to disclose his name but was ready to show these persons to the police. The said secret information was noted down in the register and a written intimation was given to the superior and permission for raid was obtained from him. This witness thereafter called Vinod Dantania, a Police Constable and asked him to call two panchas and thereafter they all gathered at the office of the Narcotic Cell. They were also informed regarding receipt of the secret information and they all reached to the place where they expected that the accused would be coming. They carried the drug testing kit box, weighing machine, seal, thread, etc. They waited till 4.15 P.M., and when the accused persons came, the informant gave a signal and they caught both the accused who were attempting to run away but the raiding party encircled them and this witness introduced himself as Gazetted Officer of Narcotic Cell. Their personal search was carried out and they were jointly offered as to whether they need to be searched in presence of a Class I

Officer or an Executive Magistrate. Since they refused, such an offer was also given in writing. Their names were also asked. On search of their person, it was found that inside the vest worn under the shirt, two square packets of charas (weighing about 500 grams each) were found out from A-1, Shivprasad and one such packet (weighing about 500 grams) was found from A-2 Mohanal, the other accused. Each packet weighed nearly 500 grams making the total weight of the charas to 1 ½ Kgs. and on testing it was found to be charas. 5 grams were taken out from each of the packets found from A-1 making it 10 grams totally and it was sealed in a small plastic bag. In all three packets were prepared one of which was to be sent to the FSL and it was marked as A-1, the other which were to be reserved as control reserve samples were marked as A-2 whereas the remaining two packets were sealed in one bag and marked as “A”. The same procedure was followed in the third packet found from the other accused and they were marked as B1, B2 and B respectively. They also made search of the house of Shivprasad

after passing a resolution but nothing was found. The raid was communicated to the official superior. After the seizure of muddamal, muddamal pavti was prepared. It was also entered into original station diary. Signatures of both the accused in the seizure memos were obtained. They were informed about their arrest and thereafter he gave the complaint.

10.1. This witness has been cross-examined at length. He agreed that there is no mention of Meldi Mata'a temple in the complaint. He agreed that there is no mention in the panchnama of their having stopped writing the same at the place of occurrence and thereafter continued that at the residential premises of the accused. There was a joint offer made to the accused. In the cross-examination this witness further agreed that the secret information was handed over to the official superior by hand delivery and the same has not been given an outward register number. His immediate official superior has not

been informed of the success of the raid but it was the Superintendent of the police who had been informed as the post of his immediate official superior was vacant. Most of the papers were written by PSI Jadhav. After the small quantity of the muddamal had been tested with the drug testing kit, the remaining muddamal had not been weighed but it was weighed before testing it. He does not recognize the importance of weight in the narcotic case. He did not agree that in the case of the prior information an official of the FSL ought to have been called at the place of occurrence. It was his first raid after his joining the Narcotic Cell. This witness has not been able to point out as to why some of the pages of the station diary were found torn of. According to him, if there are extra pages, they can be removed by the officer. He disagreed that in the Government registers no such removal can take place without concerned officer making a note of the same somewhere in the register and it is his discretion whether to make such a note or not. He disagreed to the suggestion that narcotic

substance had been found unmanned and, therefore, they foisted the case on the accused. He agreed that outward and inward register is being maintained for all the correspondence, but he disagreed that correspondence to his superior are not being reflected in any such register. He also agreed that there is no reference in the panchnama as to the registration number of both the auto rickshaws which were used as means of transportation to reach to the place. He further conceded that there were bags of eggs and pots for kulfi at the residence of the accused and he presumed that accused were trading in selling of eggs and kulfi. There was no case other than the present one against the accused. He also agreed that there ought to have been a separate offer to both the accused. All the papers were prepared in Gujarati language and admittedly both the accused were Hindi speaking persons and documents Ex.34 to Ex.39 were explained to the accused in Hindi language. However, he admitted that both of them understood Gujarati as well. According to this court, nothing substantial could be brought out

from the lengthy cross examination of this witness which could impeach the credibility of this witness. According to us, the evidence of this witness is of sterling quality and no infirmity with regard to non-compliance of mandatory and statutory provisions contained under the NDPS Act could be noted by us.

11. Thereafter the prosecution has examined and relied upon the oral testimony of P.W.2, MB Patel, Ex. 20, at pages 71-87 of the paper book. He has testified that he was called on 23.2.2000 while he was standing near tea lari at Meghaninagar between 1.30 P.M. and 2.00 P.M. He was given the information by the police which it received and was further informed that the said contraband articles were to be brought by two persons. They waited for about 1 ½ hours and thereafter two persons came and they were 'gherrowed'. They refused to give out the information regarding any contraband article they possessed. Before their search took place, they

were asked whether they intended to call any one to which they refused. Two packets were found from back of one accused (A-1) whereas one packet was found hidden from the back of the other accused. Gross weight was made of all the three packets and a small quantity of articles was taken out from the said packets and the panchnama was accordingly drawn. He identified the panchnama and his signature and the muddamal article. Totally 13 to 14 signatures were put by him on that day. This Panch is working as a partner in a contract business of parking contract at L.G. Hospital since last two years.

11.1. It may be noted that this witness was cross-examined at length by the learned advocate for the accused. However, nothing substantial has been brought out during his cross examination except that he was also engaged as panch in other two matters. According to this court, engagement as panch in other two matters, ipso facto, cannot impeach his credibility. His evidence

corroborates the evidence of P.W.3, BM Rajvanshi, with regard to receiving secret information, writing it down, conducting raid, interception of accused persons with contraband article charas in their possession and thereafter necessary formality of seizure, etc.

12. The prosecution has thereafter examined and relied upon the oral testimony of P.W.1, Baldevji Chhanaji Meena, Ex.14, pages 63-70 of the paper book. This witness is the person who carried the muddamal to FSL. At the relevant time he was working as ASI, Narcotic Cell. He has deposed that he received the muddamal from UM Jadhav, PI, for taking it to FSL, Ahmedabad. He has testified that the same was intact and the muddamal was forward through him with the letter with outward number which was handed over to FSL. From the evidence of this witness, there is no manner of doubt that the muddamal was in the custody of UM Jadhav, who handed over the same to him and at that time it was in sealed condition

and when the muddamal was delivered at FSL also it was in sealed condition and the seal was intact and, therefore, there was no possibility of tampering with the same. This witness was also cross-examined at length but nothing substantial could be brought out from his cross-examination which could impeach his credibility.

13. The prosecution has thereafter examined and relied upon the oral testimony of P.W.4, Vakhatsingh Jethisingh Solanki, Ex.45, pages 125-148 of the paper book. He has, inter alia, testified that he has registered the offence against the accused on the basis of the complaint lodged by P.W.3, BM Rajvanshi. Thereafter he made necessary arrangement for sending the muddamal to FSL, recorded statements of the witnesses and after receipt of the report from the FSL, filed charge-sheet against the accused.

13.1. It may be noted that this witness was

also cross-examined at length by the learned advocate for the accused but nothing substantial could be brought out which could impeach his credibility.

14. From the evidence of the above mentioned witnesses examined by the prosecution, it is seen that they have testified before the Court as to what role they played in the raid. They also testified with regard to compliance of Sections 42, 43, 50, 52 and 57 of the NDPS Act.

15. So far as the statutory provisions contained under Section 42 (1) of the NDPS Act is concerned, it deals with power of entry, search, seizure and arrest without warrant or authorization in a building, conveyance or enclosed place, between sunrise and sunset. So far as Section 42 (2) of the NDPS Act is concerned, it provides that where an officer takes down any information in writing under sub-section (1) of section 42 of the NDPS Act or

records grounds for his belief under the provisos thereto, he shall forthwith send a copy thereof to his immediate official superior.

16. Admittedly, the secret information received by P.W.3, BM Rajvanshi was reduced into writing and he conveyed the said secret information to his immediate official superior.

17. Section 43 of the NDPS Act provides for Power of seizure and arrest in public places. The accused were intercepted and caught hold of at Three Junction Road, Old Airport Road, Near Meldi Mata Temple, Ahmedabad which is a public place and, therefore, in the instant case, admittedly Section 43 of the NDPS Act has to be invoked and not Section 42 of the NDPS Act.

18. In the case of State of Punjab v. Balbirsingh, AIR 1994 SC 1872, the Supreme Court has observed that Section 43 which deals with the power of seizure and arrest in public places is slightly different from section 42 of the NDPS

Act in certain respects. The empowered officer while acting under section 43, need not record any reasons of his belief. Section 43 also does not mention anything about the empowered officer having prior information given by any person or about recording the same, as compared to section 42. A similar view is expressed by this court in the case of State of Gujarat v. Abdul Rasid Ibrahim Mansuri, 1991 Drugs Cases 1 (Gujarat). In the said case the prosecution case was that the accused was found at public premises. At the same time, it was not the defence of the accused that he was at some place other than public premises. So legal position is clear that section 43 of the NDPS Act would be applicable to the facts of that case.

19. In view of the aforesaid clear elucidation of the Supreme Court and this Court as well as testimonies, in instant case, provisions of Section 43 would be applied as the raid was carried out at a public place. Notwithstanding the aforementioned legal

position, the secret information received by P.W.3, BM Rajvanshi was reduced into writing and it was immediately communicated to his official superior as can be reflected from the documentary evidence on record. Therefore, the compliance of the mandatory provisions of section 42 of the NDPS Act though not required, they have been fully complied with.

20. So far as the compliance of the mandatory provisions of Section 50 of the NDPS Act is concerned, the evidence is consistent. At the time of interception and raid, P.W.3, BM Rajvanshi had informed the accused that if they so desired, they could be searched in presence of a gazetted officer or a magistrate or if they desired that they may be searched by him, then he will search them and the option was left to the accused and the accused preferred the second option and volunteered to be searched by P.W.3, BM Rajvanshi. Therefore, P.W.3, BM Rajvanshi, in presence of the panchas and other police

personnel who were members of the raiding party, searched the person of the accused and during the search he found contraband article from the vest worn under the shirt of the accused persons.

21. P.W.2, M.B. Patel, Ex.20, the panch witness, has deposed to the effect that in his presence the accused were asked about option to be searched in presence of a gazetted officer or an Executive Magistrate and in their presence the accused persons have denied to exercise the said option and, therefore, evidence of P.W.2 corroborates the evidence of P.W.3, BM Rajvanshi with regard to compliance of mandatory provisions of Section 50 of the NDPS Act. The said aspect has been disclosed in the complaint Ex.40, pages 437-440 of the paper book as well as panchnama Ex.21, pages 391-402 of the paper book. Therefore, oral testimonies of P.W.2 and P.W.3 get corroboration from the documents, complaint Ex.40 and panchnama Ex.21. Therefore, it is established that the provisions of Section 50 of the NDPS Act have been complied with.

22. So far as the journey of the muddamal from the stage of interception of the accused, search of the person of the accused and seizure and sealing of charas till it reached FSL Ahmedabad has also been duly proved and all the witnesses, in this regard, is consistent. As per the said evidence, the muddamal was not tampered with at any stage and it reached FSL Ahmedabad intact in sealed condition. The procedure for sealing was done as per the practice adopted by the police in NDPS cases. FSL report Ex.46, at pages 457-468, clearly shows that the muddamal was sealed and intact condition. It is also clear from the FSL report that it was received by FSL intact in sealed condition and on analysis of the muddamal it was found to be charas. Therefore, during journey of the muddamal from seizure and sealing till it reached FSL Ahmedabad for analysis there was no question of tampering with the said muddamal.

23. Independently this court has also perused

the documents on record and from the perusal of the same it is clear that P.W.3, BM Rajvanshi, has strictly followed the mandatory and statutory provisions contained under the NDPS Act and no discrepancy could be noticed by this court on the part of P.W.3, BM Rajvanshi with regard to compliance of the provisions of NDPS Act.

24. On overall view of the matter, according to this Court, the mandatory and statutory provisions contained under Sections 42 (1), 42 (2), 43, 50, 52 and 57 of the NDPS Act have been adhered to and complied with by P.W.3, BM Rajvanshi, and it is duly proved by the evidence of the prosecution witnesses. P.W.3, BM Rajvanshi, had taken utmost care and caution while seizing and sealing the said contraband article. The apprehension of tampering with the muddamal can be ruled out as from the stage of recovery of the muddamal till its reaching the FSL, proper care and caution was taken by the police personnel. It is on the contrary clearly proved that it was in the safe hands of police

personnel and it reached at FSL intact in sealed condition for chemical analysis.

25. In view of the aforesaid evidence, there is no manner of doubt that when the accused were intercepted, apprehended and searched, they were found in possession of contraband article charas. Necessary formalities of search and seizure were complied with in presence of panchas and the statutory requirements and formalities contained under the NDPS Act were followed and the sample was sent to FSL Ahmedabad for analysis after following the procedures under the NDPS Act.

26. On close scrutiny of the evidence on record, we find no infirmities in the findings, ultimate conclusion and the resultant order of conviction and sentence recorded by the trial court. We are in complete agreement with the said findings, ultimate conclusion and resultant order of conviction and sentence passed by the trial court, as according to us, no other conclusion is possible except the one reached by the trial

court in the facts and circumstances of the case.

27. No new argument is advanced. No new criticism is offered. No infirmity in the reasoning of the trial court is pointed out. The evidence has been carefully analyzed and fully appreciated in the closely reasoned judgment with which we fully concur. We do not think it right to invest public time in reiterating the same reasoning in our language or giving the same answers to the same criticism in our own words for the sake of form.

28. In aforesaid view of the matter, there is no reason or justifiable ground to interfere with the impugned judgment and order of conviction and sentence. The sentence awarded to the accused is minimum and has to be maintained.

29. At this stage, it has been pointed out by Mr. K.T. Dave, learned APP, that the contraband article was charas and possessing the said

contraband article, without pass or permit, is punishable under Section 20 (b) (ii) of the NDPS Act. However, through inadvertent mistake, the trial court has framed charge against the accused for commission of the offences punishable under Section 8 (c) read with Sections 21 and 29 of the NDPS Act. According to him, it is an error in framing the charge and the said error in framing charge cannot be said to be failure of justice in view of the provisions of Section 464 of the Code. Though the charge framed against the accused is for commission of the offences punishable under Section 8 (c) read with Sections 21 and 29 of the NDPS Act, the trial Court has recorded the conviction under Section 8 (c) read with Section 20 (b) of the NDPS Act. Therefore, no prejudice has been caused to the accused.

30. It is true that the trial court has, through inadvertent mistake, framed charge against the accused for commission of the

offences punishable under Section 8 (c) read with Sections 21 and 29 of the NDPS Act, which is a mistake apparent on the face of the record as possessing the contraband article 'charas', without pass or permit, is punishable under Section 20 (b) (ii) of the NDPS Act. Section 464 of the Code in terms stipulates that no finding, sentence or order by a Court of competent jurisdiction shall be deemed invalid merely on the ground that no charge was framed or on the ground of any error, omission or irregularity in the charge including any misjoinder of charges, unless, in the opinion of the Court of appeal, confirmation or revision, a failure of justice has in fact been occasioned thereby. In instant case, according to this court, the error committed by the trial court in framing the charge has not resulted into failure of justice and no prejudice has been caused to the accused. As observed earlier, though the charge was framed for commission of the offences punishable under Section 8 (c) read with Sections 21 and 29 of the NDPS Act, the trial court convicted the

accused for commission of the offences punishable under Section 8 (c) read with Section 20 (b) of the NDPS Act. Therefore, according to us, no prejudice has been caused to the accused because of the framing of the charge for commission of offences punishable under Sections 8 (c) read with Sections 21 and 29 of the NDPS Act. In instant case, framing of charge under Section 29 of the NDPS Act is also erroneous because both the accused were found with contraband article charas and both of them are separately convicted for the offences punishable under Section 8 (c) read with Section 20 (b) of the NDPS Act. Thus, though the trial court has committed an inadvertent mistake in framing the charge which has been corrected at the time of passing of the judgment and order and, therefore, no prejudice has been caused to the accused.

31. On the wake up of the aforesaid, we are not inclined to interfere with the judgment and order of conviction and sentence recorded by the

trial court and as the appeal lacks merit, it deserves to be dismissed.

32. For the foregoing reasons, the appeal fails and accordingly it is dismissed.

(A.M. Kapadia, J.)

(K.A. Puj, J.)

...

(karan)